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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-135

CABOT CORPORATION and CABOT ARGENTINA S.A.I.C.,

Respondents,

against

S.S. MORMACSCAN, her engines, etc.
MOORE-McCORMACK LINES, INC.,

and

JOHN W. McGRATH CORPORATION,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOHN W. MCGRATH CORPORATION,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

John W. McGrath Corporation, prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit, entered on March 26, 1971, affirming the judgment of the United States District Court for the Southern District of New York in favor of the plaintiffs-respondents holding a $500.00 per package limitation contained in a bill of lading inapplicable to limit petitioner-stevedores' liability to respondent for having negligently dropped respondents' cargo.

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York, printed in the Appendix herein (*infra*, pp. 1a-7a)* is reported at 298 Fed. Supp. 1171 (1969). The opinion of the Court of Appeals for the Second Circuit printed in the Appendix herein (*infra*, pp. 8a-12a) is reported at 441 F. 2nd 476 (1971).

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit is dated March 26th, 1971 (8a). A timely petition to the Court of Appeals for rehearing and suggestion for rehearing *in banc* was denied by orders entered herein on April 28th, 1971 (*infra*, p. 13a).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

(1) Did the Court of Appeals properly apply the decision of this Court in *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297 (1959), in refusing to extend the $500.00 package limitation contained in the bill of lading to the petitioner-stevedore?

(2) Need the term "stevedore" be specifically set forth in the bill of lading language extending the package limitation to third parties in order to limit the stevedores' liability to $500.00 per package?

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* Numerical references followed by "a" are to the Appendix.

Statement of the Case

Respondent Cabot Corporation (herein "Cabot") delivered to Moore-McCormack Lines (herein "Mormac") for carriage from New York to Buenos Aires aboard the S.S. MORMACSCAN under Mormac's bill of lading No. 20, dated September 20th, 1961, a cargo consisting of a turbogenerator and parts packed in skids and cases.

Mormac employed petitioner John W. McGrath Corporation (herein "McGrath") to load the ship and on or about September 22nd, 1961 McGrath had stowed one case which contained the turbogenerator in No. 3 lower hold of the ship. Thereafter, in the course of loading steel plates into the same hold, McGrath dropped two of the plates onto the case containing the turbogenerator, thereby causing it to be damaged.

McGrath stipulated that it was negligent. Plaintiff thereupon discontinued its action against Mormac and pursued its remedies solely against McGrath.

Cabot contended in the District Court that it was entitled to a full recovery of its damages against McGrath because of the stevedores' conceded negligence. McGrath at the trial invoked the $500.00 per package limitation contained in the bill of lading.

Clauses 2 and 13 of the bill of lading contain the relevant language which petitioner claims gives it the benefit of the limitation.

Clause 2 provides as follows:

> "In this bill of lading, the word 'ship' shall include any substituted vessel and any craft, lighter, or other means of conveyance owned, chartered, operated or used by the carrier in performing this contract; *the word 'carrier'* shall include the ship, her owner, operator, demise charterer, time charterer, master and

any substituted carrier, whether acting as carrier or bailee, and *all persons rendering services in connection with performance of this* contract; . . . ." (Emphasis added.)

and Clause 13 reads:

"In case of any loss or damage to or in connection with goods exceeding in actual value $500, lawful money of the United States, per package, or, in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the *carrier's* liability in any capacity, if any, shall be determined on a value of $500 per package or per customary freight unit, unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the carrier and inserted in this bill of lading and extra freight paid if required; and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed the declared value and the carrier's liability in any capacity, if any, shall not exceed the declared value. Whenever less than $500 per package or other freight unit, the value of the goods in the calculation and adjustment of claims shall, to avoid uncertainties and difficulties in fixing value, be deemed to be the invoice value, plus freight and insurance if paid, whether any other value be higher or lower." (Emphasis added.)

The District Court ruled that McGrath was not a carrier under Section 2 of the bill of lading and, therefore, could not under Section 13 of the bill limit its liability to $500.00 per package. The Court premised its ruling on the fact that at the time of the accident McGrath was en-

gaged in loading cargo belonging to a shipper other than Cabot and was not, therefore, "rendering services" in connection with the contract between Mormac and another shipper.

The Court of Appeals affirmed the judgment of the District Court on other grounds, viz. that the language of the limitation in the bill of lading did not include the petitioner-stevedore, McGrath, among those entities entitled to the benefit of the $500.00 per package limitation. The Court of Appeals recognized that parties to a bill of lading may extend a contractual benefit to a third party by expressing an intent to do so, citing *Herd* v. *Krawill Machinery Corp., supra.* The Court reasoned, however, that failure to include in the bill of lading clauses extending the package limitation language similar to "all agents and all stevedores" leads to the conclusion that the protection of stevedores against liability was not intended.

Reasons for Granting the Petition for a Writ of Certiorari

The Court of Appeals has decided this controversy in a way which is in conflict with the applicable decision of this Court. *Herd & Co.* v. *Krawill Machinery Corp., supra.* In addition, two other decisions of this Court, *The Caledonia,* 157 U. S. 124 (1895), insofar as it relates to the construction to be given bill of lading provisions, and *Seas Shipping Co.* v. *Sieracki* 328 U. S. 85 (1946), which recognizes that stevedores perform services for the carrier historically rendered by seamen, have been disregarded.

This Court has recognized "the importance to the shipping industry" of the question of the extension of a carrier's limitation of liability to stevedores. *Herd* v. *Krawill, supra,* at 300. The subject bill of lading was revised in light of the *Herd* decision and petitioner submits that sections 2 and 13, *supra,* indicate that the contracting parties

(Cabot and Mormac) intended to limit the liability of "stevedores . . . for damages caused by their negligence." *Herd* v. *Krawill, supra,* at 302. Indeed, the subject bill of lading in expanding the definition of the term "carrier" to include "all persons rendering services in connection with the performance of this contract", has followed this Court's reasoning in *Herd* to the utmost. In *Herd,* Mr. Justice Whittaker reasoned, *a priori,* that "there was nothing . . . in the limitation-of-liability provisions of the bill of lading to indicate any intention . . . of the contracting parties by the bill of lading to limit the liability of negligent agents of the carrier" (at 304), from the fact that these provisions dealt only with carrier's liability, i.e., "carrier's liability, if any, shall be determined on the basis of $500 per package" (at 302). Following the language and rationale set forth in *Herd,* was it not logical for the draftsman of the revisions in the bill of lading in question here to extend the carrier's limitations of liability to its agents who assist in the performance of the contract of carriage by expanding the definition of the term "carrier"? In *Herd,* the United States Carriage of Goods by Sea Act, its legislative history and environment were scrutinized for the meaning and the liabilities of the term "carrier" and especially to determine whether that term could properly include a stevedore. The Court of Appeals has misconstrued *Herd* so as to extend limitations of liability contained in a bill of lading to a stevedore only through the use of the talisman, "stevedore" or similar term. This was done even though this Court in *Herd* (at 302), stated that the intention of the parties to limit the liability of the stevedore must be expressed "in some way" without setting forth a formula therefor.

The opinion of the Court of Appeals is violative of the rule of bill of lading construction set forth in *The Caledonia,* 157 U. S. 124 (1895). In that case the Court was

called upon to review exculpatory provisions in a bill of lading containing the following exceptions:

> "The act of God, the Queen's enemies, pirates, restraint of princes and rulers, perils of the sea, rivers, navigation and land transit, of whatever nature or kind, restrictions at port of discharge, loss or damage from delays, collisions, straining, explosion, heat, fire, steam boilers and machinery or defects therein, transshipment, escape, accidents, suffocation, mortality, disease or deterioration in value, negligence, default or error in judgment of pilots, master, mariners, engineers, stevedores, or any other person in the employ of the steamship or of the owners or their agents."

This Court held that such a "long enumeration" actually limits the scope of exceptions. Certainly provisions with long enumeration can never be interpreted to be all encompassing. In this case the draftsman who undertook to revise the bill of lading in the light of the 1959 *Herd* decision intended to be all encompassing. Giving recognition to the realities of the shipping industry and especially to modern practices which prevail where independent contractors frequently act for and in the place of the shipowner the term "Carrier" was revised to include "all persons rendering services" in the performance of the contract. It would be hard to imagine why a stevedore should not properly and logically fall within the class of persons who not only in the practice of today but who for years have rendered service for and on behalf of shipowners. The Court of Appeals apparently felt that employment of such language was not expressing, with sufficient clarity, an intent to include stevedores. Such a holding simply ignores the recognition given by this Court to the longstanding role of a stevedore in the shipping industry.

In *Seas Shipping Co.* v. *Sieracki* (*supra*), this Court noted that "While historically the work of loading and unloading is the work of the ship's *service,* performed until recent time by members of the crew" (emphasis added). The Court below simply disregarded the fact that such work is now done by stevedores.

CONCLUSION

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

Respectfully submitted,

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APPENDIX

Opinion of the United States District Court.

[SAME TITLE]

OPINION

EDELSTEIN, D.J.

This is an action by Cabot Corporation and Cabot Argentina, S.A.I.C., foreign corporations (hereinafter Cabot) against the John W. McGrath Corporation,[1] a domestic corporation (hereinafter McGrath), stevedores, for damage to its cargo brought about by the negligence of the defendant-stevedore in dropping cargo belonging to another shipper on the previously stored cargo of the plaintiff.

Defendant, John W. McGrath Corp., concedes that while performing stevedoring operations on behalf of Moore-McCormack Lines, its stevedores negligently permitted two heavy steel plates (owned by a stranger to this action) to drop from a sling onto a steam turbine generator set owned by plaintiff. The generator set had been loaded into the hold of the ship previously. Plaintiff alleges that the damage to its cargo amounted to $42,526.72, and the defendant does not seriously dispute this figure. Defendant does maintain that it is entitled to the limitation of liability provisions contained in Sections 2 and 13 of the bill of lading that was issued to Cabot by Moore-McCormack Lines, Inc., the owner of the vessel. These sections read as follows:

"2. In this bill of lading, the word 'ship' shall include any substituted vessel, and any craft, lighter or

[1] A claim against Moore-McCormack Lines was voluntarily dismissed without prejudice.

other means of conveyance owned, chartered, operated or used by the carrier in performing this contract; *the word 'carrier' shall include* the ship, her owner, operator, demise charterer, time charterer, master and any substituted carrier, whether acting as carrier or bailee, *and all persons rendering services in connection with the performance of this contract;* the word 'shipper' shall include the person named as such in this bill of lading and the person for whose account the goods are shipped; the word 'consignee' shall include the holder of this bill of lading, properly endorsed, and the receiver and the owner of the goods; the word 'charges' shall include freight and all expenses and money obligations payable by the goods, shipper, consignee, or any of them; the words 'at the risk and expense of the goods' or the like mean, in addition at the risk and expense of the shipper and consignee; the words 'government' and 'authorities' shall each include the United Nations or any similar international organization, as well as a sovereign state or political subdivision thereof, and any person acting or purporting to act for any such."

"13. *In case of any loss or damage to or in connection with goods exceeding in actual value $500,* lawful money of the United States per package or, in case of goods not shipped in packages, per customary freight unit, *the value of the goods shall be deemed to be $500 per package* or per unit, on which basis the freight is adjusted and the carrier's liability in any capacity, if any, shall be determined on a value of $500 per package or per customary freight unit, unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the carrier and inserted in this bill of lading and extra freight paid if required; and in such case if the actual value of the goods per package or per customary freight unit shall exceed

such declared value, and the value shall nevertheless be deemed the declared value and the carrier's liability in any capacity, if any, shall not exceed the declared value. Whenever less than $500 per package or other freight unit, the value of the goods in the calculation and adjustment of claims shall, to void uncertainties and difficulties in fixing value, be deemed to be the invoice value, plus freight and insurance if paid, whether any other value be higher or lower." (emphasis added)

Defendant argues that because it—as a stevedore—rendered services in connection with the performance of plaintiff's contract with Moore-McCormack, that it is by definition a "carrier." As a result is—as a carrier—is entitled to the clear $500 limitation of liability expounded in Section 13. If defendant stevedoring corporation can be deemed a carrier within the purview of Section 2, then it is clear to this court that defendant is also entitled to the limitation provisions of Section 13.

Two questions arise in determining whether McGrath is a "carrier" within the meaning of Section 2: first, is McGrath a "person rendering service" and if so, is it rendering those services in connection with the performance of the contract (i.e., the bill of lading) between plaintiff and Moore-McCormack.

Plaintiff relies on *Herd* v. *Krawill Machinery Corp.*, 359 U. S. 297 (1959), in support of its theory that Section 2 of the bill of lading does not encompass stevedores. That *Herd* held as much is true, but what is also true is that the bill of lading in *Herd* did not contain the language "and all persons rendering services etc." By its terms it was limited to carriers as that term is generally understood. This fact was the gravamen of *Herd*, for the court made it quite clear that the bill of lading could confer the limitation of liability benefit on the third party stevedores, although in this particular bill of lading it

had not done so. Speaking for a unanimous court, Justice Whittaker said:

> "Looking to the limitation of liability provisions of the bill of lading, we see that they . . . .do not advert to stevedores or agents. Instead they deal only with the carrier's liability to the shippers. They say that the carrier's liability, if any, shall be determined on the basis of $500 per package. There is thus nothing in those provisions to indicate that the contracting parties intended to limit the liability of stevedores. . . . If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract. Since they did not do so, it follows that the provisions of the bill of lading did not cut off respondent's remedy against the agent that did the wrongful act." At 302.

In a subsequent case analogous to *Herd,* the District Court for the Virgin Islands declined to include the defendant lighterage company within the term "carrier" based on a definition of the word "carrier" which included "'the ship, her owner, master, operator, demise charterer and if bound thereby, the time charterer, and any substituted carrier, whether the owner, operator, charterer or master shall be acting as carrier or bailee." *Virgin Islands Corp.* v. *Merwin Lighterage Co.,* 177 F. Supp. 810, 13 (V. I. 1959). Following *Herd,* the court found no basis to include lighterage services in the concept of carrier as that term was defined in the bill of lading, because the intent to include them within the bill of lading was not spelled out. In *Carle & Montanari, Inc.* v. *American Export Isbrandtsen Lines, Inc.,* 275 F.Supp. 76 (S.D.N.Y. 1967) *aff'd per curiam,* 386 F.2d 839 *cert. denied sub nom. Carle & Montanari Inc.* v. *John W. McGrath Corp.,* 390 U. S. 1013 (1968), on the other hand, the term "stevedore" itself was included in the bill of lading and the court accordingly held "that under the bill of lading

the stevedore is entitled to the benefit of the $500 per package limitation of liability'' at 78.

It is undoubtedly clear, then, that a bill of lading may limit the liability of the third-party stevedore when the term stevedore is used in the bill of lading. It is less clear, however, whether a stevedore is a ''person rendering services'' within the meaning of Section 2 of the bill of lading in issue, and thus possibly entitled to the limitation provision of Section 13. Attempts to limit liability for negligence are not the most favored creatures of the law. As the *Herd* court put it:

> ''[C]ontracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they 'are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expressed such to be the understanding of the contracting parties.' *Boston Metals Co.* v. *The Winding Gulf*, 349 U. S. 122, 123-124 (conc. opin.).'' *Herd* at 305.

Here, the language employed in the bill of lading does not use the word ''stevedore.'' In the light of the dictate in *Herd* calling for clear language to express the understanding between the parties one wonders why the word ''stevedore'' was not used expressly in the instant bill of lading, inasmuch as the use of the word ''stevedore'' would have left no doubt as to the intentions of the parties concerning who are beneficiaries of the limitation provisions. It would have been a simple enough matter to have mentioned stevedores in *haec verbae, e.g.*, ''and all persons including stevedores rendering . . .''. Stevedores traditionally occupy a special place on the waterfront; it is unlikely that they would not be specifically mentioned by name if a provision in the bill of lading limiting liability was intended to extend to them. For the purposes of this decision, however, the court need not resolve the

question whether the phrase "all persons rendering services" covers stevedores. Even if it were to be assumed that the limitation provisions in the instant bill of lading applied to the stevedores here they would still be precluded from its protective provisions because they were not rendering services in connection with Cabot's (i.e., *this*) contract, but were instead rendering services in connection with another shipper not a party in this action.

It is conceded by defendant that the damage to plaintiff's cargo occurred at a time well after plaintiff's cargo had been delivered to the ship and had already been safely stored in the hold. At the time of the accident defendant was engaged in loading into the hold cargo belonging to some shipper other than Cabot; the defendant was not at that time rendering any services in connection with Cabot's contract—the bill of lading with Moore-McCormack Lines, Inc. Defendant would have the court stretch the plain meaning of the words "this contract" to include other cargo loading operations for different shippers under different bills of lading on the rather novel theory that completion of the loading operation for the entire ship would benefit each of the individual shippers. In essence, at the expense of an unsuspecting shipper, the defendant is attempting to extract from a narrow clause of a bill of lading a blanket immunity the penumbrae of which can only be a matter of speculation. But the phrase "this contract" must be construed strictly and cannot be held to refer to anything but the bill of lading under which Cabot's cargo was to be shipped.

Accordingly, this court concludes that defendant McGrath is not entitled to the benefits of being termed a "carrier" under Section 2[2] and therefore may not plead

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[2] *Cf. Cosa Export Co., Inc.* v. *Transamerican Freight Lines, Inc.*, 1968 AMC 1351. There defendant stevedore damaged the goods while unloading a truck. Although the bill of lading ex-

(*footnote continued on following page*)

the $500 limitation in Section 13 as a defense to this action.[3]

The above is to be deemed the required findings of fact and conclusions of law.

Judgment for the plaintiff.

Settle order.

DAVID N. EDELSTEIN,
U.S.D.J.

Dated: New York, N. Y., April 29, 1969.

(*footnote continued from previous page*)

pressly included stevedores in the limitation section for work "in connection with the performance of any of the Carrier's obligations," the court held that:

> "In unloading from the truck, the stevedore was an independent contractor and, pursuant to th ceontract between them, the stevedore was not performing an obligation of the ocean carrier in loading or unloading and it is therefore not entitled to the benefit of the bill of lading limitation provision . . . [T]he [stevedore] was not [an] agent in connection with the independent business of the stevedore in the unloading from the truck, and the bill of lading expresses no such intent." At 1356-7.

[3] Plaintiff argues that to include the stevedore in the limitation of liability provision is to render the bill of lading an illegal contract. Considering this court's determination of the ultimate issue, there is no need to discuss or pass on this issue.

Opinion of the United States Court of Appeals.

UNITED STATER COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 392—September Term, 1970

(Argued January 18, 1971 Decided March 26, 1971)

Docket No. 33876

Before: Hays and Anderson, Circuit Judges, and Tyler, District Judge.*

Appeal from a judgment entered in the United States District Court for the Southern District of New York, David N. Edelstein, *Judge*, holding a $500.00 per package limitation contained in a bill of lading inapplicable to limit appellant-stevedore's liability to appellees for having negligently damaged appellees' cargo.

Affirmed.

Martin J. McHugh, New York, New York (Maurice F. Beshlian, James M. Kenny, McHugh, Heckman, Smith & Leonard, New York, New York, on the brief), *for Appellant,*

Martin B. Mulroy, New York, New York (Hill, Rivkins, Warburton, McGowan & Carey, New York, New York, on the brief), *for Appellee.*

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* Of the United States District Court for the Southern District of New York, sitting by designation.

Hays, Circuit Judge:

Appellee Cabot Corporation delivered a large turbogenerator and parts packed in skids and cases to Moore-McCormack Lines for transport aboard the S.S. Mormacscan under Moore-McCormack's bill of lading. Cabot had received a dock receipt making the shipment subject to the standard bill of lading then used by Moore-McCormack. For the job of loading the ship, Moore-McCormack employed the appellant John W. McGrath Corp. The cases containing the turbogenerator were safely stowed in the No. 3 lower hold of the Mormacscan. However, in the course of loading heavy steel plates belonging to another shipper into the same hold, McGrath's employees dropped two of the plates onto appellees' turbogenerator, seriously damaging it.

McGrath stipulated that it had acted negligently in causing damage to Cabot's cargo and appellees thereupon discontinued their action against Moore-McCormack and elected to pursue their remedies exclusively against McGrath. McGrath invoked the $500.00 per package limitation contained in the bill of lading to limit its liability to that figure.

The district court held that the limitation clause contained in the bill of lading was inapplicable to shield appellant from liability to appellees for having negligently damaged appellee's cargo. The ground of the decision was that Cabot and McGrath were no longer in any contractual relationship at the time of the accident, since McGrath was not "rendering services in connection with Cabot's . . . contract [i.e. the bill of lading], but [was] instead rendering services in connection with another shipper not a party in this action." Although we affirm the judgment of the district court, we do so on the ground that the language of the limitation in the bill of lading does not include appellant-stevedore McGrath among those entitled to the benefit of the $500.00 limitation.

Clauses 2 and 13 of the bill of lading contain the relevant language which appellant claims gives it the benefit of the limitation.

Clause 2 provides as follows:

> "In this bill of lading, the word 'ship' shall include any substituted vessel and any craft, lighter, or other means of conveyance owned, chartered, operated or used by the carrier in performing this contract; *the word 'carrier'* shall include the ship, her owner, operator, demise charterer, time charterer, master and any substituted carrier, whether acting as carrier or bailee, and *all persons rendering services in connection with performance of this* contract; . . ." (Emphasis added.)

and Clause 13 reads:

> "In case of any loss or damage to or in connection with goods exceeding in actual value $500, lawful money of the United States, per package, or, in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the *carrier's* liability in any capacity, if any, shall be determined on a value of $500 per package or per customary freight unit, unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the carrier and inserted in this bill of lading and extra freight paid if required; and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed the declared value and the carrier's liability in any capacity, if any, shall not exceed the declared value. Whenever less than $500 per package or other freight unit, the value of the goods in the calculation and

> adjustment of claims shall, to avoid uncertainties and difficulties in fixing value, be deemed to be the invoice value, plus freight and insurance if paid, whether any other value be higher or lower." (Emphasis added.)

In this bill of lading, a contract of adhesion prepared by the carrier (see *Caterpillar Overseas, S.A.* v. *SS Expeditor,* 318 F.2d 720, 722 (2d Cir. 1963), cert. denied, 375 U.S. 942 (1963)), limitations of liability are to be construed most strongly against the parties who introduced them into the contract. *The Caledonia,* 157 U.S. 124, 137 1895); *Compania De Navigacion La Flecha* v. *Brauer,* 168 U.S. 104, 118 (1897). In construing exculpatory language in a bill of lading on facts similar to ours, the Supreme Court said:

> ". . . [C]ontracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they 'are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties.' *Boston Metals Co.* v. *The Winding Gulf,* 349 U.S. 122, 123-24 (concurring opinion)."

Robert C. Herd & Co., Inc. v. *Krawill Machinery Corp.,* 359 U.S. 297, 305 (1959).

The language in the instant bill of lading does not exhibit the clarity required to extend the limitation of liability to the appellant-stevedore. Even if Cabot had actually received a copy of the bill of lading before delivery of the turbogenerator for shipping, it could not have ascertained from the ambiguous language employed whether the $500.00 limitation applied to the stevedore. One can only guess whether clause 13 which speaks in terms of the "carrier's liability in any capacity" is in-

tended to incorporate the phrase "all persons rendering services in connection with performance of this contract" from clause 2, and, indeed, initially, whether "all persons rendering services" is designed to include stevedores loading the goods of another shipper.

While there is no doubt that the parties to a bill of lading may extend a contractual benefit to a third party by clearly expressing their intent to do so, *Herd & Co.* v. *Krawill Machinery Corp.*, supra at 302, an intention to extend benefits of the limitation in the present bill to the stevedore would most naturally have been expressed by the addition of the term "stevedore" to the long list of various persons included under the definition of "carrier" in clause 2. In *Carle & Montanari, Inc.* v. *American Export Isbrandtsen Lines, Inc.*, 275 F.Supp. 76 (S.D.N.Y.), aff'd per curiam, 386 F.2d 839 (2d Cir. 1967), cert. denied sub nom. *Carle & Monanari* v. *John W. McGrath Corp.*, 390 U.S. 1013 (1968), the benefit of the $500.00 limitation was extended to the same stevedore involved here, but the bill of lading included the language "all agents and all stevedores." 275 F.Supp. at 78. The failure to include similar language here would lead one to believe that the protection of stevedores against liability was not intended. In any case such an intention was not expressed with sufficient "clarity of language."

We will "not stretch the language when the party drafting such a form contract has not included a provision it easily might have." *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959).

Affirmed.

Order Denying Petition for Rehearing.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is

DENIED.

PAUL R. HAYS
ROBERT P. ANDERSON,
Circuit Judges
H. R. TYLER, JR., D.J.

April 28, 1971.

Order Denying Petition for Rehearing in Banc.

33876

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

April 28, 1971.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CABOT CORPORATION and CABOT ARGENTINA S.A.I.C.,

Plaintiffs,

-against-

S.S. MORMACSCAN, her engines, etc., MOORE-McCORMACK LINES, INC. and JOHN W. McGRATH CORPORATION,

Defendants.

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62 AD 783

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the defendant JOHN W. McGRATH CORPORATION hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment entered herein on June 16th, 1969 and from each and every part thereof as well as the whole thereof.

Dated: New York, New York

July 3rd, 1969

McHUGH & LEONARD

By /s/ Maurice F. Beshlian
Member of the Firm
Attorneys for Defendant
John W. McGrath Corporation
70 Pine Street
New York, N.Y. 10005

TO:
CLERK OF THE COURT

HILL, RIVKINS, WARBURTON,
McGOWAN & CAREY
Attorneys for Plaintiffs
96 Fulton Street
New York, N.Y. 10038

A true copy.

A. Daniel Fusaro

Clerk

U. S. DISTRICT COURT
FILED
JUNE 13, 1969
S. D. of N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CABOT CORPORATION and CABOT ARGENTINA S. A. I. C.,

Plaintiffs,

-against-

S. S. MORMACSCAN, her engines, etc., MOORE-McCORMACK LINES, INC. and JOHN W. McGRATH CORPORATION,

Defendants.

62 AD 783

COUNTER JUDGMENT

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The above entitled action having duly come on for trial before this Court and it having been tried to the Honorable David Edelstein and a decision dated April 29th, 1969 having been rendered awarding judgment to the plaintiff it is now on motion of McHugh & Leonard, attorneys for the defendant John W. McGrath,

ORDERED, ADJUDGED and DECREED that the plaintiffs Cabot Corporation and Cabot Argentina S. A. I. C. recover from the defendant John W. McGrath Corporation its damages together with interest and costs and it is further

ORDERED that this matter be referred to Neal J. Morse, Esq., c/o Chadbourne, Parke, Whiteside and Wolff, 25 Broadway, N. Y., N. Y., Commissioner, to ascertain and compute the amount due to plaintiffs in the premises and to report the same to this Court with all convenient speed and that before acting under this decree the said Commissioner shall take and file his oath with the Clerk of this Court.

Dated: New York, New York
June 13, 1969

/s/ David Edelstein
U. S. D. J.

JUDGMENT ENTERED 6/16/69

/s/ John Livingston
Clerk